No. 06-856

Supreme Court, U.S.
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In The Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., DEWOLFF, BOBERG & ASSOCIATES EMPLOYEES' SAVINGS PLAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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H.R. 9824, 84th Cong. (Aug. 2, 1973), *reprinted in* 1 Leg. Hist. 731 24

H.R. Rep. No. 93-533 (Oct. 2, 1973), *reprinted in* 1974 U.S.C.C.A.N. 4639 24

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401(k) Plans: A 25-Year Retrospective, Research Perspective (Inv. Co. Instit., Washington, D.C.), Nov. 2006, http://ici.org/statements/res/per12-02.pdf 12

Advisory Council on Employee Welfare & Pension Benefit Plans, U.S. Dep't of Labor, *Report of the Working Group on Guidance in Selecting and Monitoring Service Providers* 2-6 (Nov. 13, 1996) 14

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Dana Muir, *ERISA & Investment Issues*, 65 Ohio St. L.J. 199 (2004) 7

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Sutherland Statutory Construction (6th ed. 2000) 21

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BRIEF FOR THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Pension Rights Center submits this brief *amicus curiae* in support of the petitioner in *LaRue v. DeWolff*, No. 06-856. Petitioner has given blanket consent to any person seeking to file an *amicus* brief. Written consent to file this brief has been obtained from the respondents and their letter is filed with this brief pursuant to Rule 37.2(b) of the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*[1]

Established in 1976, after the enactment of the Employee Retirement Income Security Act ("ERISA"), the Pension Rights Center is a Washington, D.C. non-profit, consumer organization which has as its mission the protection and promotion of retirement security for workers, retirees and their families. For over thirty years, the Center has provided legal representation, informal assistance, and information to tens of thousands of participants and beneficiaries seeking to recover pension and 401(k) benefits and ensure that their plans are prudently managed. The resolution of the first question presented in the petition will have an impact on the Center's ability to help employees and retirees enforce their rights.

[1] Pursuant to Rule 37.6 of the Rules of this Court, the Center states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

ERISA was passed in 1974 in response to a growing concern that American workers were not receiving the pension benefits that they were promised. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-75 (1980) ("One of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated."). Congress found, among other things, that "the soundness and stability of plans with respect to adequate funds to pay promised benefits" were endangered. ERISA § 2(a), 29 U.S.C. § 1001(a). "Congress wanted to correct this condition by making sure that if a worker has been promised a [] pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – -he actually will receive it." *Nachman*, 446 U.S. at 375.

ERISA protects "the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal Courts." ERISA § 2(b), 29 U.S.C. § 1001(b). The fiduciary standards found in section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), impose upon fiduciaries the duty of loyalty and the duty of care, which have been described as among the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982); *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984). The duty of loyalty requires each fiduciary to act with "complete and undivided loyalty to the beneficiaries of the trust" and with an "eye single to the interests of the participants and beneficiaries." *Id.* The duty of care

requires each fiduciary to act with the "care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent man acting in a like capacity and familiar with such matters" would employ. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

ERISA provides a comprehensive remedial scheme to enforce these stringent fiduciary responsibilities owed to participants and beneficiaries. Section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), allows participants to bring suit for relief under section 409 of ERISA, 29 U.S.C. § 1109, including recovery of losses to the plan resulting from fiduciary breaches and other equitable and remedial relief as the court may deem appropriate.

The court of appeals erred when it held that a participant in a 401(k) plan cannot sue under sections 409 and 502(a)(2) for losses resulting from the alleged failure of a fiduciary to follow the participant's directions with respect to investment of assets in his individual account. Based on its incorrect reading of this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), the court of appeals held that the requested recovery of losses would not "benefit the plan as a whole" and, therefore, the petitioner could not bring a claim under sections 409 and 502(a)(2). This result is contrary to the express language of section 409 which permits the recovery of "any losses to the plan."

The court of appeals also misunderstood the nature of defined contribution plans. A defined contribution plan provides for an individual account for each participant, but the assets of the plan are required to be held in trust. The assets of the trust are allocated to individual participant accounts, but the participants do not have legal title to

those assets. Because the expenses of the trust are not only used to pay benefits, but also to pay administrative and other costs, relief that goes to a defined contribution plan, even if ultimately allocated to individual accounts, is relief that "benefits the plan as a whole."

If this Court determines that the relief sought here is not relief that "benefits the plan as a whole," it should reconsider the scope of its holding in *Russell*. The narrow issue before this Court in *Russell* was whether a participant was entitled to extra-contractual compensatory and punitive damages for improper or untimely processing of a benefit claim. It was not necessary for this Court to answer the broader question of whether section 409 is limited to relief to the plan. Section 409 may be read as allowing equitable or remedial relief for any fiduciary violation, not simply for violations that injure the plan. While the meaning and scope of "remedial relief" is not apparent from the statute or case law, Congress clearly intended it to include something other than either equitable relief, which it authorized in section 409, or legal relief, which it rejected. A sensible interpretation of "remedial relief," which would be consistent with ERISA's goals, would be any relief that corrected a wrong or redressed an injury, which would include make-whole monetary relief.

Defined contribution plans have become the primary means through which American workers supplement their social security income in retirement. If the court of appeals decision is allowed to stand, the retirement income of millions of Americans will be jeopardized because there will be no meaningful manner in which participants in such plans will be able to insure that their investment

choices are honored and their retirement income is secured.

ARGUMENT

I. SECTIONS 409 AND 502(a)(2) AUTHORIZE A PARTICIPANT IN A DEFINED CONTRIBUTION PENSION PLAN TO SUE TO RECOVER LOSSES TO THE PLAN CAUSED BY A FIDUCIARY BREACH EVEN THOUGH THE LOSSES WILL BE ALLOCATED TO THE PARTICIPANT'S INDIVIDUAL ACCOUNT.

1. Section 502(a)(2) of ERISA provides that a civil action may be brought by a participant for "appropriate relief under § 409." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, provides that "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). The petitioner seeks approximately $150,000 restored to his defined contribution plan for losses allegedly caused by a fiduciary's failure to invest plan assets in his account according to his directions. He specifically requests an order requiring the fiduciary to reimburse to the plan amounts necessary so that his interest in the plan is what it should have been, but for the breach of fiduciary duty. Because the petitioner is seeking recovery of a loss to the plan resulting from a fiduciary breach that will then be allocated to his account, he has a claim under the plain language of sections 409 and 502(a)(2) of ERISA.

Contrary to the court of appeals decision, section 409 does not limit relief against a fiduciary to a narrow category of cases where the breach impacts every plan participant and the recovered losses go to every (or even most) plan participants. Consistent with ERISA's broad remedial goals, section 409(a) broadly states that a fiduciary who breaches "*any* of the responsibilities, obligations, or duties imposed upon fiduciaries shall be personally liable . . . [for] *any* losses to the plan resulting from *each* such breach." 29 U.S.C. § 1109(a) (emphasis added). On its face, the statute does not require that the losses be paid "for the benefit of the plan as a whole."

But even if section 409 requires that the recovery benefit the plan as a whole, the relief requested by the petitioner meets this requirement. The petitioner is a participant in a defined contribution pension plan. Under section 3(34) of ERISA, a defined contribution pension plan is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34). The assets of defined contribution plans are required to be held in trust by one or more trustees who have authority and discretion to manage and control the assets of the plan. ERISA § 403(a), 29 U.S.C. § 1103(a).

A defined contribution plan may permit the participant to direct the investment of assets allocated to his or her account, but the participant does not have legal title to the assets. *See* Rev. Rul. 89-52, 1989-1 C.B. 110 ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account-balance

will be invested, it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will.") (citation omitted). The participant's "account" in a defined contribution plan is simply a bookkeeping entry in which certain assets of the plan are allocated to the participant. "[T]he sum of all the account balances . . . equals the total market value of the plan's assets." Dan M. McGill, *Fundamentals of Private Pensions* 247 (7th ed. 1996). As one noted commentator on ERISA has pointed out, "[i]n [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants' accounts." Dana Muir, *ERISA & Investment Issues*, 65 Ohio St. L.J. 199, 235 (2004). Thus, a loss to an individual account in a defined contribution pension plan is a corresponding loss to the plan "as a whole" and is recoverable under sections 409 and 502(a)(2), even if this Court reads the words "as a whole" into the statute.[2]

What the plan is owed and what any given participant should have allocated to his account as a result of a

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[2] *See Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir. 1995) ("Defendants' argument that a breach must harm the entire plan to give rise to liability under § 1109 would insulate fiduciaries who breach their duty so long as the breach does not harm all of a plan's participants. Such a result clearly would contravene ERISA's imposition of a fiduciary duty that has been characterized as 'the highest known to law.' "); *In re Schering-Plough Corp. ERISA Litigation*, 420 F.3d 231, 235 (3d Cir. 2005) ("the fact that the assets at issue were held for the ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan"); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003) (clarifying that a claim for losses relating to financial mismanagement is properly brought under section 502(a)(2) even if the relief ultimately flows to individuals).

recovery for a fiduciary breach in a 401(k) plan are actually two distinct questions. The plan assets held in trust are used to pay benefits, but are also used to defray expenses of operating the plan, including expenses for recordkeeping, auditing, annual reporting, claims processing and other administrative expenses. So even here, where the complaint alleges losses resulting from the failure to follow a single participant's instructions, the injury to the plan affects every account. If the plan had more money from the date of the breach, each participant's account would have suffered a slightly lower percentage charge to pay plan wide expenses. Consequently, if the instant suit is successful, the fiduciaries of the plan must allocate the recovery, taking into consideration the interests of all participants in the plan. How they should do so is not before the court, though as a theoretical matter, an improper allocation could be challenged in a subsequent action that would be purely equitable.

2. This interpretation of sections 409 and 502(a)(2) is consistent with this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). In *Russell* a participant's disability benefits were terminated by the plan's disability committee and then later reinstated. The participant brought suit, alleging that "[t]he interruption of benefit payments . . . forced [her] disabled husband to cash out his retirement savings which, in turn, aggravated the psychological condition that caused [the participant's] back ailment." *Id.* at 137. She brought suit under section 502(a)(2) seeking punitive damages and damages for mental or emotional distress, to be paid directly to her. *Id.* at 138. This Court held that the participant did not have standing to seek extra-contractual

compensatory or punitive damages for improper or untimely processing of a benefit claim under sections 409 and 502(a)(2) of ERISA. Noting that section 502(a)(1)(B) governs benefit claims, this Court stated "that recovery for a violation of § 409 inures to the benefit of the plan as a whole." *Id.* at 140.

By stating that recovery under section 409 inures to the benefit of the plan as a whole, *Russell* was simply distinguishing a claim seeking relief to be paid directly to an individual participant from relief to be paid directly to the plan. *Russell* acknowledged that "the fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan." *Russell*, 473 U.S. at 142. This Court explained, however, that section 503 of ERISA, 29 U.S.C. § 1133, protects participants from untimely and improper benefit determinations and section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), authorizes a beneficiary to enforce her rights under a plan. *Russell*, 473 U.S. at 143-44. Neither of those sections provided for extra-contractual compensatory or punitive relief.

In contrast to these claims authorized by sections 502(a)(1)(B) and 503 of ERISA, this Court observed that the focus of section 409 was on the overall management of the plan and the investment of plan assets rather than on the participant's benefit claim. This Court explained that "the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Russell*, 473 U.S. at 142-43. Surveying the legislative history, this Court found that

the floor debates revealed "that the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future." *Id.* at 140 n.8. This Court concluded that "[a] fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Id.* at 142.

It is entirely consistent with *Russell* to hold that a participant has a cause of action against a fiduciary under sections 409 and 502(a)(2) for losses resulting from the failure to follow the participant's directions in a 401(k) plan. 29 U.S.C. § 1109, 29 U.S.C. § 1132(a)(2). As *Russell* pointed out, the primary concern of Congress in section 409 was to protect plan assets in order to insure that retirement benefits will ultimately be paid. At the time *Russell* was decided, 401(k) plans were in their infancy, *see infra* at 11-12, and the language of *Russell* reflected the more common situation in defined benefit plans where a participant's retirement benefit was dependent on the financial solvency of the plan's entire investment portfolio (the plan as a whole). In 401(k) plans, a participant's retirement benefit is dependent on the performance of the investment options the participant chooses and not the plan's entire investment portfolio. But there is no reason to believe that Congress intended to provide less protection for participants who depend on only a portion of a plan's investment portfolio for retirement benefits than for those who depend on a plan's entire investment portfolio for those same benefits. Nor is there any reason to believe that this court in *Russell* meant to imply that ERISA provided

diminished protection for 401(k) plan participants, when nothing in the case required this Court even to consider the relief available to participants in such plans.

To read *Russell* as simply distinguishing a claim seeking relief to be paid directly to an individual participant from relief to be paid directly to the plan is supported by this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). *Varity* contrasted the various enforcement provisions contained in section 502, noting that each served a specific purpose. Section 502(a)(1)(B) provides relief "that runs directly to the injured beneficiary" with respect to benefit claims. *Varity*, 516 U.S. at 512. Section 502(a)(2), on the other hand, provides the enforcement provision for "fiduciary obligations related to the plan's financial integrity," *id.* at 512, in accordance with "a special congressional concern about plan asset management" reflected in section 409, *id.* at 511. Finally, turning to sections 502(a)(3) and (5), 29 U.S.C. § 1132(a)(3) and (5), *Varity* held that these sections are "catchall" provisions which could "include an award to 'participants and beneficiaries', rather than to the 'plan,' for breach of fiduciary obligation." *Id.* at 510-11. Thus, *Varity* clarifies that *Russell's* reference to relief to "the plan as a whole," *id.* at 522, simply stands for the proposition that relief under sections 409 and 502(a)(2) must be paid to the plan rather than directly to a participant.

3. This interpretation of section 409 and 502(a)(2) is necessary in order to protect the retirement security of American workers, the primary goal of ERISA. Although 401(k) plans did not come into general use until 1981, they have become the most common employer-sponsored retirement plan in the United States, having more active participants and about as many assets as all other private

pension plans combined. *401(k) Plans: A 25-Year Retrospective*, Research Perspective (Inv. Co. Inst., Washington, D.C.), Nov. 2006, at 1-2, http://ici.org/statements/res/per12-02.pdf. As of 2005, 401(k) plans held $2.4 trillion in assets and covered 47 million active participants. *Id.* at 3.[3]

Workers in 401(k) plans have individual accounts which are funded by employee contributions and usually include a matching or other contribution by the employer. *401(k) Plan Asset Allocation, Account Balances, and Loan Activity*, Perspective (Inv. Co. Inst., Washington, D.C.), Jan. 1999 at 3, http://ici.org/statements/perspective/per05-01.pdf. Usually, a 401(k) plan offers participants an array of investment options, and participants choose the options in which money allocated to their accounts will be invested. *Id.* Unlike the benefit provided by a defined benefit plan, which is specific and guaranteed by the Federal government, the retirement benefit a worker receives from a 401(k) plan depends on the amounts contributed to the plan and the returns on the investments chosen by the worker. Pension Benefit Guar. Corp., *A Predictable Secure Pension for Life, Defined Benefit Pensions*, Jan. 2000 at 2-6. Because the participant does not hold title to the assets in his account, he must rely on plan fiduciaries to follow his investment directions and make any requested transfers. If a 401(k) plan meets the requirements of section 404(c) of ERISA, 29 U.S.C. § 1104(c), the plan fiduciary is

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[3] 401(k) plans are one of several types of defined contribution plans. At the current time, defined contribution plans overall hold approximately $3.2 trillion in assets. *See* Bd. of Governors of the Fed. Reserve Sys., Statistical Release Z.1, *Flow of Funds Accounts of the United States: Flows and Outstandings, Fourth Quarter 2006*, Mar. 8, 2007 at 113.

not liable for any losses caused by the participant's investment decisions.[4]

The failure to follow the petitioner's "own particular instructions," as the court of appeals described the alleged violation, was not a breach of a duty "owed solely" to the petitioner. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 450 F.3d 570, 574 (4th Cir. 2006). In describing the duties fiduciaries owed to plans in *Russell*, this Court stated that "[t]he principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Russell*, 473 U.S. at 142-43. It is of fundamental importance to the retirement security of all plan participants in a 401(k) plan that fiduciaries have systems in place to promptly transfer assets from one investment to another at the request of a participant. Department of Labor regulations require a plan intending to qualify as a 404(c) plan to allow participants to transfer assets in their account into and out of the various plan investment options with a frequency that is reasonable in light of the market volatility of those investment options. 29 C.F.R. § 2550.404c-1. Most 401(k) plan participants are permitted to make daily transactions in their plans. *The Economics of Providing 401(k) Plans:*

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[4] Under section 404(c) of ERISA, 29 U.S.C. § 1104(c), employers are exempted from liability for investment losses when a plan participant exercises control over assets in his account "as determined under regulations of the Secretary [of Labor]." The regulations, issued in 1992, generally require 401(k) plans to afford participants certain opportunities, satisfy certain disclosure requirements, offer certain categories of investments, and refrain from prohibited transactions. *See* 29 C.F.R. § 2550.404c-1.

Services, Fees, and Expenses, Research Fundamentals (Inv. Co. Inst., Washington, D.C.), Nov. 2006 at 3, n.6, http://www.ici.org/pdf/fm-v15n7.pdf. The underlying purpose of these transfer rules is to allow plan participants to minimize large investment losses by quickly transferring out of sinking investments. The transfer rules have no meaning if plan fiduciaries cannot be held liable for the failure to follow plan participants' investment directions.[5]

Notwithstanding the fear expressed by the court of appeals, *LaRue*, 450 F.3d at 577, making fiduciaries liable for losses resulting from the failure to follow participant directions is unlikely to deter plan formation or the service of qualified individuals and institutions as fiduciaries. Congress sought to encourage the formation of employee benefit plans, in large part, by establishing the regulation of such plans "as exclusively a federal concern" and preempting state and local laws that would subject them to conflicting administrative and financial burdens, including state law remedies that were available to participants before ERISA was enacted. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). Congress, however, also imposed on fiduciaries the substantive duties of loyalty and care and provided a cause of action in sections 409 and 502(a)(2) of ERISA for the recovery of losses caused by fiduciary breaches that put employees' retirement security at risk.

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[5] A 401(k) plan fiduciary has a duty to prudently select and monitor those who provide administrative services to the plan, including the service provider responsible for processing participant transactions. *See* 29 C.F.R. § 2509.75-8, FR-14, 29 C.F.R. § 2509.96-1(e) (1999); Advisory Council on Employee Welfare & Pension Benefit Plans, U.S. Dep't of Labor, *Report of the Working Group on Guidance in Selecting and Monitoring Service Providers*, at 2-6 (Nov. 13, 1996); 97-16A Op. Pension & Welfare Benefits Admin. (May 22, 1997).

Giving effect to the text of sections 409 and 502(a)(2) that authorizes the recovery of "any" losses to the plan caused by "any" fiduciary breach implements the balance struck by Congress. 29 U.S.C. § 1109, 29 U.S.C. § 1132(a)(2).

One of the primary factors motivating employers to offer 401(k) plans is the need to attract and retain qualified workers with competitive compensation packages. *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, Research Fundamentals (Inv. Co. Inst., Washington, D.C.) at 1. Workers who participate in 401(k) plans contribute a portion of their salaries to those plans and receive matching contributions from their employers as part of their compensation package. Pension Benefit Guaranty Corporation, *A Predictable Secure Pension for Life, Defined Benefit Pensions*, at 6. In many 401(k) plans, the participants share the cost of plan administration, including costs associated with transferring assets from one investment option to another. *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, Research Fundamentals (Inv. Co. Inst., Washington, D.C.) at 4-5. Employees contribute their own money and participate in 401(k) plans based on the understanding that the plans are administered by fiduciaries who are acting prudently and solely in their interest. To hold that plan fiduciaries are not liable for fiduciary breaches that cause losses to participants' accounts and the plan as a whole would seriously undermine the confidence workers have in these plans to provide for their retirement security.

II. THIS COURT'S HOLDING IN *RUSSELL* DOES NOT FORECLOSE RECOVERY OF LOSSES TO PARTICIPANTS UNDER SECTIONS 409 AND 502(a)(2), AND, IF IT DOES, THIS COURT SHOULD RECONSIDER *RUSSELL*.

1. This Court in *Russell* held that sections 409 and 502(a)(2) do not authorize an action for extra-contractual and compensatory relief against a fiduciary for improper or untimely handling of a disability benefit claim. At the time *Russell* was decided, this Court had not yet considered the scope of the remaining remedial provisions of section 502 of ERISA. As the concurring opinion noted, "[t]his case presents a single, narrow question: whether the § 409 'appropriate relief' referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of extra-contractual damages for breach of fiduciary duty." *Russell*, 473 U.S. at 149 (Brennan, J., concurring). The concurring opinion also noted that "since § 502(a)(3) already provides participants and beneficiaries with 'other appropriate equitable relief . . . to redress violations,' there is no reason to construe § 409 expansively in order to bring these individuals under the penumbra of 'equitable or remedial relief.'" *Id.* at 150.

Since that time, this Court has construed the "appropriate equitable relief" provision of section 502(a)(3) narrowly, in actions brought against non-fiduciaries, to include only those remedies that were "typically available in equity" and not damages. Although this Court has not considered the scope of "appropriate equitable relief" under section 502(a)(3) in an action brought against a fiduciary until this case, the lower courts have almost unanimously held that make-whole relief against a breaching fiduciary is not available under that section. In

doing so, courts have suggested that this Court reconsider the scope of relief available in section 502 in order to provide the protections to participants and beneficiaries that Congress intended. *See, e.g., DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 422, 453 (3d Cir. 2003) (Becker, J., concurring); *Cicio v. Does 1-8*, 321 F.3d 83, 105 (2d Cir. 2003) (Calabresi, J., dissenting), *vacated*, 542 U.S. 933 (2004).

If this Court determines that make-whole relief against a breaching fiduciary is not available under section 502(a)(3) of the Act, this Court should limit its holding in *Russell* to the narrow issues presented by that case, *i.e.*, that extra-contractual remedies are not available for the improper and delayed handling of a benefit claim, and should reconsider the scope of sections 409 and 502(a)(2).[6] As this Court stated in *Russell*, ERISA has an "interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'" *Russell*, 473 U.S. at 146 (quoting *Nachman*, 446 U.S. at 361). Thus, in construing sections 409 and 502(a)(2) this Court should not look at those

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[6] The Center agrees with the petitioner that section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes a participant to bring suit against a fiduciary for make-whole relief. The Center, however, believes this Court need not reach the scope of section 502(a)(3) because the petitioner's cause of action is more appropriately brought under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), as seeking relief to the plan. Therefore, relief under the general "catchall" provisions of section 502(a)(3) will not be required except to the extent that it may be necessary to allocate the plan's recovery to the appropriate participant account. *Varity*, 516 U.S. at 515. ("Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'")

provisions in a vacuum, but should take into consideration the entire remedial scheme of section 502 and the purposes of the statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *Sutherland Statutory Construction* § 46:05 (5th ed. 1991) (a statute must be considered as a whole, not just the particular section in a vacuum).

2. Section 409 of ERISA provides:

> LIABILITY FOR BREACH OF FIDUCIARY DUTY.
>
> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of [ERISA] § 411.

29 U.S.C. § 1109.

In *Russell*, this Court stated that section 409 is limited to relief to the plan. In reaching that conclusion, this Court noted that the phrase "and shall be subject to such other equitable or remedial relief as the court may deem appropriate" must be read in the context of the earlier portion of section 409 which characterizes the fiduciary relationship as one "with respect to a plan" and speaks of

the potential liability of a fiduciary to make good "to the plan" any losses "to the plan." Reading these sections as a whole, this Court concluded that the phrase "other equitable or remedial relief" must be read as limited to such relief for the plan. *Russell*, 473 U.S. at 134.

It is far more plausible and consistent with cannons of statutory construction to read section 409 in the following manner: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate." *Id.* at 139. Under this reading of section 409, equitable and remedial relief are not limited to relief to the plan, but are also available to participants and beneficiaries who have been individually harmed by a fiduciary breach.

This reading of section 409 is supported by its grammatical structure. Grammatically, the three clauses of section 409(a) are separated by commas and by the word "and." 29 U.S.C. § 1109(a). If Congress had intended a list of parallel remedies, as suggested by the opinion in *Russell*, it would have followed the ordinary grammatical rules for setting out a list, setting off the first clause with a comma, and listing the final "equitable and remedial relief" clause after the word "and" with no comma at all. "The rule here is that the comma is correct if it can be replaced by the word *and* or *or*." Lynn Truss, *Eats, Shoots & Leaves* (Gotham Book 2003) at 83. But Congress adopted a structure that is utterly idiosyncratic when it instead separated each clause of section 409 by both a comma and the conjunction "and." This indicates that Congress was setting forth a list of discrete remedies, not in any way dependent on the others. For example, in *United States v.*

Ron Pair Enter., Inc., 489 U.S. 235, 242 (1989), this Court construed the phrase "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose" as allowing interest on a claim independent of any agreement providing for reasonable fees, costs or charges. This Court stated:

> This reading is also mandated by the grammatical structure of the statute. The phrase 'interest on such claim' is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words 'and any.' As a result, the phrase 'interest on such claim' stands independent of the language that follows . . . The language and punctuation Congress used cannot be read in any other way. By the plain language of the statute, the types of remedies are distinct.

Id. at 241-42.

Similarly, the language and punctuation of section 409 mandate that the phrase "and shall be subject to such other equitable or remedial relief" provides for remedies that are distinct from the previous remedies outlined in section 409. ERISA § 409(a), 29 U.S.C. § 1109(a). Unlike the language describing the recovery of losses to the plan or restoration to such plan of any profits made by a fiduciary, the language authorizing equitable and remedial relief makes no reference to a plan. Thus, section 409 must be construed to create more general remedies for fiduciary breaches than for remedies only to the plan.

To read section 409 as limited to relief "to the plan as a whole" effectively adds language to section 409(a) to say "and shall be subject to such other equitable or remedial relief *for the benefit of the plan as a whole* as the court may

deem appropriate." *See Aronsen v. Crown Zellerbach,* 662 F.2d 584, 590 (9th Cir. 1981) ("It is consistent with the general principle of statutory construction that a court should not add language to an unambiguous statute absent a manifest error in drafting or unresolvable inconsistency."); *see also Sutherland Statutory Construction* § 47:38 (6th ed. 2000). (Insertion of words in a statute is permissible but "it is utterly unwarranted unless the omission from . . . the text is plain.").

Section 409's reference to a fiduciary's duties "with respect to a plan" does not, as *Russell* suggests, indicate that Congress intended for section 409 relief to be limited to relief to the plan. ERISA § 409(a), 29 U.S.C. § 1109(a). Instead, that phrase is more naturally read to extend the fiduciary requirements, and thus the remedies for breach of those requirements, to all of a fiduciary's plan-related functions. *See Webster's Third New International Dictionary* 1934 (1986) (equating "respect to" with "regard or reference to" and "concerned with"). This Court has recognized that Congress intended for ERISA's fiduciary provisions to codify the strict duties of loyalty and care that traditionally applied to trustees under the common law of trusts. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transport, Inc.*, 472 U.S. 559, 570-71 (1985). Although these provisions apply to a fiduciary's actions in managing the plan and its assets, under ERISA, as under the common law, the trustee's duties run directly to the beneficiary. *Russell*, 473 U.S. at 142 ("the fiduciary obligations of plan administrators are to serve the interest of the participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan"); *see also id.* at 152-53 (Brennan, J., concurring in the judgment) ("[I]t is black-letter trust law that fiduciaries owe strict

duties running directly to beneficiaries in the administration and payment of trust benefits."); Restatement (Third) of Trusts § 170(1) at 384 (1992) ("The trustee is under a duty to administer the trust solely in the interest of the beneficiary."). There is, therefore, no reason to read the phrase "with respect to a plan" as supporting an interpretation of section 409 that excludes relief to participants and beneficiaries.[7]

3. The phrase "equitable and remedial relief" should be construed to include make-whole relief to individuals who are harmed by fiduciary breaches. Because *Russell* held that section 409 did not provide a remedy for a participant alleging a fiduciary breach with respect to a benefit denial, this Court did not determine the meaning of the phrase "other equitable or remedial relief." Indeed, this Court expressly left open "any question concerning the extent to which § 409 may authorize recovery of extracontractual compensatory or punitive damages from a fiduciary by a *plan*." 473 U.S. at 144 n.12. Accordingly, if this Court determines that sections 409 and 502(a)(2) authorize a suit for individual relief, the question remains open whether make-whole relief for a participant or beneficiary against a breaching fiduciary is available.

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[7] The committee reports stressed the importance of giving participants the ability to protect their own interests as well as the interest of the plan. *See* S. Rep. No. 93-127 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 ("without standards by which a participant can measure the fiduciary's conduct . . . he is not equipped to safeguard either his own rights or the plan assets"); *id.* at 4863 ("the safeguarding effect of the fiduciary responsibility section will operate efficiently only if the fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general").

Although this Court determined in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) that equitable relief does not include make-whole monetary relief (at least against a non-fiduciary), this Court should hold that make-whole relief is a form of "remedial relief" available under section 409. "Remedial relief" is not defined by ERISA, nor is the term commonly found in statutes or case law. "Remedial relief" must mean something other than "equitable relief," which the statute expressly authorizes, and it must mean something other than "legal relief," which Congress expressly omitted from section 502. "Remedial" is defined in *Black's Law Dictionary* as:

> **1.** Affording or providing a remedy; providing the means of obtaining redress <a remedial action>. **2.** Intended to correct, remove, or lessen a wrong, fault or defect <a remedial statute>. **3.** Of or relating to a means of enforcing an existing substantive right; procedural <a remedial right>.

Black's Law Dictionary 1296 (7th ed. 1999). Although *Black's Law Dictionary* does not define "remedial remedy," it does define "remedial law" as:

> **1.** A law providing a means to enforce rights or redress injuries. **2.** A law passed to correct or modify an existing law; esp. a law that gives a party a new or different remedy when the existing remedy, if any, is inadequate.

Id. "Remedial relief" in section 409 should, therefore, be broadly construed as relief that corrects a wrong or redresses an injury, which should encompass make-whole relief to a participant or beneficiary who suffers an injury as a result of a fiduciary breach. Such a reading would be

consistent with the statute's primary purpose of protecting participants and beneficiaries, but would exclude such legal relief as was designed to punish or deter rather than to correct a wrong, notably punitive damages.[8]

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[8] To be sure, the legislative history supports the view that in using the word "remedial" Congress meant "legal." Contrary to this Court's description of ERISA's legislative history in *Russell*, 473 U.S. at 145-46, it is clear that the "equitable or remedial" language adopted by the conference committee and passed by Congress was derived from prior House versions of the bill which became ERISA. *See* H.R. 9824, 84th Cong. (Aug. 2, 1973), *reprinted in* 1 *Legislative History of the Employee Retirement Income Security Act of 1974*, Pub. Law 93-406, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate (April 1976) ("Leg. Hist.") 731; H.R. 2 (Oct. 2, 1973), *reprinted in* 2 Leg. Hist. 2288; H.R. 2 (Mar. 6, 1974), *reprinted in* 3 Leg. Hist. 3952. Thus, the statement in H.R. Rep. No. 93-533 (Oct. 2, 1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655, that bill was authorizing "the full range of legal and equitable remedies available in both state and federal courts," quoted by the Court in *Russell*, *supra*, referred to the version of H.R. 2 of the same date which utilized the language "equitable or remedial." This was the language that was adopted in conference and from the legislative history that both Houses understood the bill to provide the "full range of legal and equitable remedies." Nevertheless, Congress's failure to use the word "legal" in the statute itself supports the view that "remedial" means something more than "equitable" but less than "legal."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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